

[•]<sup>1</sup> as a Service Agreement

**Commented [A1]:** All inserts in red throughout the text are initial feedback received from the Board of Investors, which will be dealt with in a further version. The insertions are necessary for investors for them to be able to use the contract in single measure agreements.

This contract has been prepared and approved for LAUNCH, an EU-funded project that aims to broaden and streamline Energy Service Company (ESCO) market offerings, on the basis of standardised contracts for smaller customers that also support substantial funding arrangements and securitisation. Only the schedules to the contract may be negotiated (except the energy savings measurement methodology). You must not negotiate any deletions or other changes to, or make any representations or enter into any arrangements that change or are inconsistent with, the main section of the contract or the energy savings measurement methodology. If you have suggestions for how the standard contract might evolve in due course, please let us know, and we may periodically update the template.

This agreement (“**Agreement**”) is made on [DATE]

**BETWEEN**

- (1) [FULL COMPANY NAME] incorporated and registered in England and Wales with company number [NUMBER] whose registered office is at [REGISTERED OFFICE ADDRESS] (**Company**)
- (2) [FULL COMPANY NAME] incorporated and registered in England and Wales with company number [NUMBER] whose registered office is at [REGISTERED OFFICE ADDRESS] (**Subscriber**)

**BACKGROUND**

- A. The Company has developed a [•] service for business, municipal and other public premises, which may involve the provision (but not the sale, lease or hire) of certain equipment [•] as may be required to provide [•] as a service to the customer premises.
- B. The Subscriber wishes to use the Company’s service at its premises without owning the equipment required to provide the service.
- C. The Company has agreed to provide and the Subscriber has agreed to take and pay for the Company’s service subject to the terms and conditions of this Agreement.

**AGREED TERMS**

**1. INTERPRETATION**

Capitalised terms used in this Agreement that are not otherwise defined where they first appear shall have the following meaning:

**Additional Services:** means any additional services within the scope of this Agreement requested by the Subscriber (and, if agreed by the parties, to be supplied by the Company) pursuant to Clause 4.

**Applicable Law:** means all laws, regulations and regulatory rules applicable to the activities of a party to this Agreement.

**Business Day:** a day other than a Saturday, Sunday or public holiday in England when banks in London are

<sup>1</sup> Throughout the Contract: “[•]” will be replaced each time with the service provided by the ESCO: may it be lighting, heating, cooling, and so forth.

open for business.

**Contract Year:** means each successive 12 calendar month period during the Term, the first Contract Year commencing on the 1<sup>st</sup> day of the month immediately after the Effective Date;

**Control:** means the beneficial ownership of more than 50% of the issued share capital of a company or the legal power to direct or cause the direction of the general management of the company, and **controls, controlled** and the expression **change of control** shall be construed accordingly.

**Confidential Information:** information that is proprietary or confidential and is either clearly labelled as such or identified as Confidential Information in Clause 11.5 or Clause 11.6.

**Company Data:** means the Services Manual and the data supporting the performance of the Services.

**Effective Date:** the date on which this Agreement is signed by both parties.

**Energy:** means the power source or any other energy required to provide the Services at the Premises.

**Energy Provider:** means the supplier of the Energy.

**Energy Savings:** has the meaning given in Schedule 2.

**Energy Savings Data:** means the supporting data demonstrating the Energy Savings.

**Equipment:** means the equipment specified in Schedule 1.

**Intellectual Property Rights** means any patent, copyright, database right, moral right, design right, registered design, trade mark, service mark, domain name, metatag, know how, model, unregistered design (and any application for such right) or other intellectual property right anywhere in the world.

• **Plan:** means the quantity, • [output] type, and general • arrangements required to provide the Services at the Premises.

**Mandatory Policies:** the policies and related procedures [attached OR listed] in Schedule 4, as duly amended from time to time.

**Minimum Energy Savings:** has the meaning given in Schedule 2.

**Minimum Savings Guarantee:** has the meaning given in Clause 2.7.

**Normal Business Hours:** [8.00 am to 6.00 pm] local UK time, each Business Day.

**Premises:** means the premises specified in Schedule 1.

**Services:** • , Support Services, the use of the Equipment and the Services Manual, as more particularly described in Schedule 1.

**Services Manual:** guidance from the Company to the Subscriber on the supply and usage of the Services.

**Software:** the software applications operated or provided by the Company as part of the Services.

**Service Fees:** the subscription fees payable by the Subscriber to the Company for the User Subscriptions, as set out in Paragraph 1 of Schedule 2.

**Step-in Party:** a financial institution or other entity nominated by the Company for the purposes of Clause 13.4.

**Subscriber Data:** the data provided by the Subscriber to the Company about the Subscriber, its staff, business and the Premises for the purpose of using the Services.

**Support Services:** means the obligations specified in the Support Service Levels.

**Support Service Levels:** the Company's current policy from time to time for providing core support to its subscribers generally for services that are the same type as the Services under this Agreement, as described in Schedule 3.

**Term:** means the period specified in Schedule 2, subject to the provisions of clause 13.

**Virus:** any thing or device (including any software, code, file or programme) which may: prevent, impair or otherwise adversely affect the operation of any computer software, hardware or network, any telecommunications service, equipment or network or any other service or device; prevent, impair or otherwise adversely affect access to or the operation of any programme or data, including the reliability of any programme or data (whether by re-arranging, altering or erasing the programme or data in whole or part or otherwise); or adversely affect the user experience, including worms, trojan horses, viruses and other similar things or devices.

**Vulnerability:** a weakness in the computational logic (for example, code) found in software and hardware components that when exploited, results in a negative impact to the confidentiality, integrity, or availability, and the term **Vulnerabilities** shall be construed accordingly.

## 2. COMPANY'S OBLIGATIONS

2.1. The Company shall, during the Term, provide the Services to the Subscriber on and subject to the terms of this Agreement.

2.2. The Company shall use commercially reasonable endeavours to make the Services available 24 hours a day, seven days a week, except for:

2.2.1. planned maintenance carried out during the agreed Support Hours specified in Schedule 3; and

2.2.2. unscheduled maintenance performed outside Normal Business Hours, provided that the Company has used reasonable endeavours to give the Subscriber at least **[[24] Normal Business Hours]** notice in advance.

2.3. The Company shall provide and maintain the necessary Equipment to deliver the Services in the Premises.

2.4. The Company will supply the Support Services in accordance with its then current Support Service Levels. The Company may amend the Support Service Levels in its sole and absolute discretion from time to time, provided that such changes apply to subscribers generally.

2.5. The Company will at all times provide the Services with reasonable skill and care.

2.6. The Energy Savings and Minimum Energy Savings shall be measured, calculated and recalculated as specified in Schedule 2. A report of the results of such measurement and calculation shall be provided within ninety (90) days after each anniversary of the Performance Commencement Date. A report of the results of any recalculation shall be provided within ninety (90) days after the date of such recalculation.

- 2.7. The Company hereby guarantees that the Minimum Energy Savings will be achieved during each Contract Year as a result of the installation and operation of the Equipment and provision of the Services, subject to the satisfactory performance by the Subscriber of all the Subscriber's obligations under this Agreement and the provisions of Clause 13 ("**Minimum Savings Guarantee**"). In the event the Energy Savings achieved during any Contract Year in which the Minimum Savings Guarantee is in effect is less than the Minimum Energy Savings during that Contract Year, the Company shall pay to the Subscriber an amount equal to the deficiency (subject to the Company's right of set-off in Clause 8).
- 2.8. This Agreement shall not prevent the Company from entering into similar Agreements with third parties, or from independently developing, using, selling or licensing documentation, products and/or services which are similar to those provided under this Agreement.
- 2.9. The Company warrants that it has and will maintain all necessary licences, consents, and permissions necessary for the performance of its obligations under this Agreement.
- 2.10. In performing its obligations under this Agreement the Company shall comply with the Mandatory Policies applicable to its activities.
- 2.11. During the Term, the Company shall, at its own expense, obtain and maintain the following insurances in relation to the Service on the following terms:
- 2.11.1. insurance of the Equipment to a value not less than its full replacement value comprehensively against all usual risks of loss, damage or destruction by fire, theft or accident;
  - 2.11.2. insurance for such amounts as a prudent owner or operator of the Equipment would insure for, or such amount as the Company may from time to time reasonably require, to cover any third party or public liability risks of whatever nature and however arising in connection with the Equipment; and
  - 2.11.3. insurance against such other or further risks relating to the Equipment as may be required by law, together with such other insurance as the Company may from time to time consider reasonably necessary.
  - 2.11.4. The Company shall be responsible for paying any deductibles due on any claims under such insurance policies.
  - 2.11.5. The Subscriber shall give immediate written notice to the Company in the event of any loss, accident or damage to the Equipment.

### **3. SUBSCRIBER'S OBLIGATIONS**

#### **3.1. The Subscriber shall:**

##### **3.1.1. provide the Company with:**

- (a) all necessary co-operation in relation to this Agreement; and
- (b) all necessary access to the Premises and such information,

as may be required by the Company in order to provide the Services and to maintain the Equipment, including but not limited to Subscriber Data, security access information;

##### **3.1.2. in addition to the information obtained by the Company via the Software, provide to the Company**

all the Energy bills and Energy billing data required to calculate the Service Fees in accordance with the calculations specified in Schedule 2;

- 3.1.3. without affecting its other obligations under this Agreement, comply with all applicable laws and regulations with respect to its activities under this Agreement;
  - 3.1.4. carry out all other Subscriber responsibilities set out in this Agreement in a timely and efficient manner. In the event of any delays in the Subscriber's provision of such assistance as agreed by the parties, the Company may adjust any agreed timetable or delivery schedule as reasonably necessary;
  - 3.1.5. ensure that it either owns or duly pays the rent at the Premises;
  - 3.1.6. obtain and shall maintain all necessary licences, consents, and permissions necessary for the Company, its contractors and agents to perform their obligations under this Agreement, including without limitation the Services;
  - 3.1.7. ensure that its network and systems comply with the relevant specifications provided by the Company from time to time; and
  - 3.1.8. be, to the extent permitted by law and except as otherwise expressly provided in this Agreement, solely responsible for:
    - (a) procuring, maintaining and securing the supply of Energy and its Energy network connections; and
    - (b) the Subscriber's contractual arrangements with the Energy Provider and Energy network connections, including all problems, conditions, delays, delivery failures and other loss or damage arising from or relating to such contractual arrangements and Energy network connections.
- 3.2. The Subscriber shall not except as may be allowed by any applicable law which is incapable of exclusion by Agreement between the parties and except to the extent expressly permitted under this Agreement:
- 3.2.1. attempt to copy, modify, duplicate, create derivative works from, frame, mirror, republish, download, display, transmit, or distribute all or any portion of the Software or commercial terms in any form or media or by any means; or
  - 3.2.2. attempt to de-compile, reverse compile, disassemble, reverse engineer or otherwise reduce to human-perceivable form all or any part of the Software; or
  - 3.2.3. access all or any part of the Services in order to build a product or service which competes with the Services; or
  - 3.2.4. use the Services to provide services to third parties; or
  - 3.2.5. subject to Clause 22.1, license, sell, rent, lease, transfer, assign, distribute, display, disclose, or otherwise commercially exploit, or otherwise make the Services available to any third party; or
  - 3.2.6. attempt to obtain, or assist third parties in obtaining, access to the Services, other than as provided under this Clause 3; or
  - 3.2.7. introduce or permit the introduction of, any Virus or Vulnerability into the Company's network and information systems.

- 3.3. The Subscriber shall use all reasonable endeavours to prevent any unauthorised access to, or use of, the Services and, in the event of any such unauthorised access or use, promptly notify the Company.
- 3.4. The rights provided under this Clause 3 are granted to the Subscriber only, and shall not be considered granted to any subsidiary or holding company of the Subscriber.
- 3.5. In performing its obligations under this Agreement the Subscriber shall comply with the Mandatory Policies applicable to its activities.
- 3.6. The Subscriber shall during the Term:
  - 3.6.1. ensure that the environment in which the Equipment is kept meets the minimum requirements specified by the Company;
  - 3.6.2. take such steps (including compliance with all safety and usage instructions provided by the Company) as may be necessary to ensure, so far as is reasonably practicable, that the Equipment is at all times safe and without risk to health when it is being used, cleaned or maintained by a person at work;
  - 3.6.3. make no alteration to the Equipment and shall not remove any existing component(s) from the Equipment;
  - 3.6.4. keep the Company fully informed of all material matters relating to the Equipment;
  - 3.6.5. keep the Equipment at all times at the Premises and shall not move or attempt to move any part of the Equipment to any other location without the Company's prior written consent;
  - 3.6.6. permit the Company or its duly authorised representative to inspect the Equipment at all reasonable times and for such purpose to enter upon the Premises or any premises at which the Equipment may be located, and shall grant reasonable access and facilities for such inspection;
  - 3.6.7. not sell or offer for sale, let or lend the Equipment or allow the creation of any mortgage, charge, lien or other security interest in respect of it;
  - 3.6.8. not without the prior written consent of the Company, attach the Equipment to any land or building so as to cause the Equipment to become a permanent or immovable fixture on such land or building (rather than a removable fitting). The Equipment must be capable of being removed without material injury to such land or building and the Subscriber shall repair and make good any damage caused by the affixation or removal of the Equipment from any land or building and indemnify the Company against all losses, costs or expenses incurred as a result of such affixation or removal;
  - 3.6.9. not do or permit to be done any act or thing which will or may jeopardise the right, title and/or interest of the Company in the Equipment and the Subscriber must take all necessary steps to ensure that the Company may enter such land or building and recover the Equipment both during the Term and for a reasonable period thereafter, including by procuring from any person having an interest in such land or building, a waiver in writing and in favour of the Company of any rights such person may have or acquire in the Equipment and a right for the Company to enter onto such land or building to remove the Equipment;
  - 3.6.10. not suffer or permit the Equipment to be confiscated, seized or taken out of its possession or control under any distress, execution or other legal process, but if the Equipment is so confiscated, seized or taken, the Subscriber shall notify the Company and the Subscriber shall at its sole expense use its best endeavours to procure an immediate release of the Equipment

and shall indemnify the Company on demand against all losses, costs, charges, damages and expenses incurred as a result of such confiscation;

- 3.6.11. not use the Equipment for any unlawful purpose;
- 3.6.12. ensure that at all times the Equipment remains identifiable as being the Company's property and wherever possible shall ensure that a visible sign to that effect is attached to the Equipment;
- 3.6.13. not do or permit to be done anything which could invalidate the insurances referred to in Clause 2.11.
- 3.6.14. *We will introduce a mutual insurance clause and mechanics*

#### **4. NO ADDITIONAL SERVICES**

- 4.1. If the Subscriber wishes the Company to undertake any Additional Services it would have to be under a separate agreement.

#### **5. SUBSCRIBER DATA**

- 5.1. The Subscriber shall own all right, title and interest in and to all of the Subscriber Data that is not personal data and shall have sole responsibility for the legality, reliability, integrity, accuracy and quality of all such Subscriber Data.
- 5.2. The Company shall, in providing the Services, comply with its Privacy and Security Policy relating to the privacy and security of the Subscriber Data, as such document may be amended from time to time by the Company in its sole discretion.

#### **6. COMPANY DATA**

- 6.1. The Company shall own all right, title and interest in and to all of the Company Data that is not personal data and shall have sole responsibility for the legality, reliability, integrity, accuracy and quality of all such Company Data.

#### **7. THIRD PARTY PROVIDERS**

- 7.1. The Parties agree that the Subscriber may, obtain Energy and certain services, software or equipment from third party suppliers, in which case the Subscriber does so solely at its own risk. The Company makes no representation, warranty or commitment and shall have no liability or obligation whatsoever in relation to the content or use of any such third party providers or any contract entered into by the Subscriber with any such third party. Any contract entered into with a third party provider is between the Subscriber and the relevant third party, and not the Company. The Company does not endorse or approve any third party provider, service, software or equipment nor the content of any communication by any third party provider.

#### **8. CHARGES AND PAYMENT**

- 8.1. As consideration for the provision of Services by the Company, the Subscriber shall pay the Service Fees to the Company in accordance with this Clause 9 and Schedule 2. Time of payment shall be of the essence.
- 8.2. The Company may at any time, without notice to the Subscriber, set off any liability of the Subscriber to the Company against any liability of the Company to the Subscriber, whether either liability is present or future, liquidated or unliquidated, and whether or not either liability arises under this Agreement. If the

liabilities to be set off are expressed in different currencies, the Company may convert either liability at a market rate of exchange for the purpose of set-off. Any exercise by the Company of its rights under this clause shall not limit or affect any other rights or remedies available to it under this Agreement or otherwise.

8.3. If the Company has not received payment on the due date for payment, and without prejudice to any other rights and remedies of the Company:

8.3.1. the Company may, subject to Applicable Law and without liability to the Subscriber, exercise any of its rights under Clause 13; and

8.3.2. interest shall accrue on a daily basis on such due amounts at an annual rate equal to [1.5] % over [LIBOR][EURIBOR][the then current base lending rate of [the Company's bankers in the UK] from time to time, commencing on the due date and continuing until fully paid, whether before or after and court judgment.

8.4. All amounts and fees stated or referred to in this Agreement:

8.4.1. shall be payable in pounds sterling;

8.4.2. are, subject to Clause 13.3.2, non-cancellable and non-refundable;

8.4.3. are exclusive of value added tax, which shall be added to the Company's invoice(s) at the appropriate rate.

8.5. For the avoidance of doubt, unless otherwise specified in this Agreement, the Subscriber is responsible for paying the Energy Provider(s) for the supply of the Energy, and any payments due in respect of the Subscriber's obligations under Clause 3.

## 9. PROPRIETARY RIGHTS

9.1. The Subscriber acknowledges and agrees that the Company and/or its licensors own all Intellectual Property Rights in the Services, Software, Equipment and Company Data. Except as expressly stated herein, this Agreement does not grant the Subscriber any rights to, under or in, any Intellectual Property Rights in respect of the Services, Software, Company Data or the Equipment.

9.2. The Company confirms that it has all the rights in relation to the Services, Software, Equipment and Company Data that are necessary to grant all the rights it purports to grant under, and in accordance with, the terms of this Agreement.

9.3. The Subscriber hereby grants to the Company a perpetual, worldwide, irrevocable, transferrable, royalty free licence (with the right to sub-licence) the right to access, view, use, store, process, disclose, distribute, resell, combine, aggregate, adapt and transfer and create derivative works from the Energy Savings Data for any purpose, including but not limited to publicising the Energy Savings delivered through the use of and investment in the Services.

9.4. Title to, and the risk of loss of, the Equipment shall remain with the Company at all times during the Term. Title and property in all substitutions, replacements, renewals made in or to the Equipment shall vest in the Company immediately upon installation.

## 10. CONFIDENTIALITY

10.1. Each party may be given access to Confidential Information from the other party in order to perform its obligations under this Agreement. A party's Confidential Information shall not be deemed to

include information that:

- 10.1.1. is or becomes publicly known other than through any act or omission of the receiving party;
  - 10.1.2. was in the other party's lawful possession before the disclosure;
  - 10.1.3. is lawfully disclosed to the receiving party by a third party without restriction on disclosure;  
or
  - 10.1.4. is independently developed by the receiving party, which independent development can be shown by written evidence.
- 10.2. Subject to Clause 10.4, each party shall hold the other's Confidential Information in confidence and not make the other's Confidential Information available to any third party, or use the other's Confidential Information for any purpose other than the implementation of this Agreement.
- 10.3. Each party shall take all reasonable steps to ensure that the other's Confidential Information to which it has access is not disclosed or distributed by its employees or agents in violation of the terms of this Agreement.
- 10.4. A party may disclose Confidential Information to the extent such Confidential Information is required to be disclosed by law, by any governmental or other regulatory authority or by a court or other authority of competent jurisdiction, provided that, to the extent it is legally permitted to do so, it gives the other party as much notice of such disclosure as possible and, where notice of disclosure is not prohibited and is given in accordance with this Clause 10.4, it takes into account the reasonable requests of the other party in relation to the content of such disclosure.
- 10.5. The Subscriber acknowledges that the Company Data, details of the Services, and the results of any performance tests of the Services, constitute the Company's Confidential Information.
- 10.6. The Company acknowledges that the Subscriber Data is the Confidential Information of the Subscriber.
- 10.7. No party shall make, or permit any person to make, any public announcement concerning this Agreement without the prior written consent of the other parties (such consent not to be unreasonably withheld or delayed), except as required by law, any governmental or regulatory authority (including, without limitation, any relevant securities exchange), any court or other authority of competent jurisdiction.
- 10.8. The above provisions of this Clause 10 shall survive termination of this Agreement, however arising.

#### **11. INDEMNITY**

- 11.1. The Subscriber shall defend, indemnify and hold harmless the Company against claims, actions, proceedings, losses, damages, expenses and costs (including without limitation court costs and reasonable legal fees) arising out of or in connection with the Subscriber's use of the Services, Software, Equipment, and/or Company Data otherwise than in accordance with the provisions of this Agreement and any breach of the Subscriber's obligations under Clause 3 and 10.5, provided that:
- 11.1.1. the Subscriber is given prompt notice of any such claim;
  - 11.1.2. the Company provides reasonable co-operation to the Subscriber in the defence and settlement of such claim, at the Subscriber's expense; and
  - 11.1.3. the Subscriber is given sole authority to defend or settle the claim.

- 11.2. The Company shall defend indemnify and hold harmless the Subscriber, its officers, directors and employees against any claim that the Subscriber's use of the Services, Software, Equipment, or Company Data in accordance with this Agreement infringes any United Kingdom Intellectual Property Right, and shall indemnify the Subscriber for any amounts awarded against the Subscriber in judgment or settlement of such claims, provided that:
- 11.2.1. the Company is given prompt notice of any such claim;
  - 11.2.2. the Subscriber provides reasonable co-operation to the Company in the defence and settlement of such claim, at the Company's expense; and
  - 11.2.3. the Company is given sole authority to defend or settle the claim.
- 11.3. In the defence or settlement of any claim under the indemnity in Clause 11.2, the Company may procure the right for the Subscriber to continue using the Services, replace or modify the Services so that they become non-infringing or, if such remedies are not reasonably available, terminate this Agreement on 30 days' notice to the Subscriber without any additional liability or obligation to pay liquidated damages or other additional costs to the Subscriber.
- 11.4. In no event shall the Company, its employees, agents and sub-contractors be liable to the Subscriber to the extent that the alleged infringement under Clause 11.2 is based on:
- 11.4.1. a modification of the Services by anyone other than the Company; or
  - 11.4.2. the Subscriber's use of the Services in a manner contrary to the instructions given to the Subscriber by the Company; or
  - 11.4.3. the Subscriber's use of the Services after notice of the alleged or actual infringement from the Company or any appropriate authority.
- 11.5. The provisions of Clauses 11.2, 11.3, 11.4 and Clause 12.4.2 state the Subscriber's sole and exclusive rights and remedies, and the Company's (including the Company's employees', agents' and sub-contractors') entire obligations and liability, for infringement of any patent, copyright, trade mark, database right or right of confidentiality.

## **12. LIMITATION OF LIABILITY**

- 12.1. Subject to the provisions of this Clause 12, each party shall only be liable for direct loss or damage arising directly from its own breach of contract, negligence or wilful misconduct.
- 12.2. Except as expressly and specifically provided in this Agreement:
- 12.2.1. having agreed to the calculation of Energy Savings, the Subscriber assumes sole responsibility for the benefits and other results obtained from its receipt and use of the Services;
  - 12.2.2. the Company shall have no liability for any damage caused by errors or omissions in any information or instructions provided to the Company by the Subscriber in connection with the Services, or any actions taken by the Company at the Subscriber's direction;
  - 12.2.3. all warranties, representations, conditions and all other terms of any kind whatsoever implied by statute or common law are, to the fullest extent permitted by applicable law, excluded from this Agreement; and

- 12.2.4. the Services are provided to the Subscriber on an “as is” basis.
- 12.3. Nothing in this Agreement excludes the liability of either party:
  - 12.3.1. for death or personal injury caused by that party’s negligence; or
  - 12.3.2. for fraud or fraudulent misrepresentation.
- 12.4. Subject to Clause 12.3:
  - 12.4.1. the Company shall not be liable whether in tort (including for negligence or breach of statutory duty), contract, misrepresentation, restitution or otherwise for any loss of profits, loss of business, depletion of goodwill and/or similar losses or loss or corruption of data or information, or pure economic loss, or for any special, indirect or consequential loss, costs, damages, charges or expenses however arising under this Agreement; and
  - 12.4.2. the Company’s total aggregate liability in contract (including in respect of the indemnity at Clause 11.2), tort (including negligence or breach of statutory duty), misrepresentation, restitution or otherwise, arising in connection with the performance or contemplated performance of this Agreement shall be limited to the total Service Fees paid for the User Subscriptions during the 12 months immediately preceding the date on which the claim arose.

### **13. TERM AND TERMINATION**

- 13.1. This Agreement shall, unless otherwise terminated as provided in this Clause 13, commence on the Effective Date and shall continue for the Term, unless otherwise terminated in accordance with the provisions of this Agreement.
- 13.2. Without affecting any other right or remedy available to it and subject to the provisions of Clause 13.4, the Company may suspend the provision of all or part of the Services if:
  - 13.2.1. the Subscriber commits a material breach of any term of this Agreement (including any failure to pay any amount due and payable) which breach is irremediable or (if such breach is remediable) fails to remedy that breach within a period of 30 days after being notified in writing to do so;
  - 13.2.2. the Subscriber repeatedly breaches any of the terms of this Agreement in such a manner as to reasonably justify the opinion that its conduct is inconsistent with it having the intention or ability to give effect to the terms of this Agreement.
- 13.3. Without affecting any other right or remedy available to it and subject to the provisions of Clause 13.4, either party may terminate this Agreement with immediate effect by giving written notice to the other party if:
  - 13.3.1. the other party commits a material breach of any term of this Agreement (including any failure to pay any amount due and payable) which breach is irremediable or (if such breach is remediable) fails to remedy that breach within a period of 30 days after being notified in writing to do so;
  - 13.3.2. the other party repeatedly breaches any of the terms of this Agreement in such a manner as to reasonably justify the opinion that its conduct is inconsistent with it having the intention or ability to give effect to the terms of this Agreement;
  - 13.3.3. the other party suspends, or threatens to suspend, payment of its debts or is unable to pay its

debts as they fall due or admits inability to pay its debts or is deemed unable to pay its debts within the meaning of section 123 of the Insolvency Act 1986, as if the words "it is proved to the satisfaction of the court" did not appear in sections 123(1)(e) or 123(2) of the Insolvency Act 1986;

- 13.3.4. a petition is filed, a notice is given, a resolution is passed, or an order is made, for or in connection with the winding up of that other party other than for the sole purpose of a scheme for a solvent amalgamation of that other party with one or more other companies or the solvent reconstruction of that other party;
  - 13.3.5. an application is made to court, or an order is made, for the appointment of an administrator, or if a notice of intention to appoint an administrator is given or if an administrator is appointed, over the other party;
  - 13.3.6. the holder of a qualifying floating charge over the assets of that other party has become entitled to appoint or has appointed an administrative receiver;
  - 13.3.7. a person becomes entitled to appoint a receiver over the assets of the other party or a receiver is appointed over the assets of the other party;
  - 13.3.8. a creditor or encumbrancer of the other party attaches or takes possession of, or a distress, execution, sequestration or other such process is levied or enforced on or sued against, the whole or any part of the other party's assets and such attachment or process is not discharged within 14 days;
  - 13.3.9. any event occurs, or proceeding is taken, with respect to the other party in any jurisdiction to which it is subject that has an effect equivalent or similar to any of the events mentioned in Clause 13.2.3 to Clause 13.2.8 (inclusive); or
  - 13.3.10. the other party suspends or ceases, or threatens to suspend or cease, carrying on all or a substantial part of its business.
- 13.4. The Company may in its sole and absolute discretion notify the Subscriber of the appointment of a Step-in Party (whether obliged to do so in connection with any finance arrangement or otherwise). In the event that the Company has notified the Subscriber of any Step-in Party:
- 13.4.1. the Subscriber shall promptly inform the Step-in Party in writing, by registered letter with acknowledgment of receipt, of all contractual events or breaches which could lead to suspension, cancellation, termination, annulment or any other form of dissolution, for any reason whatsoever, of this Agreement;
  - 13.4.2. such termination of this Agreement and/or suspension of the contractual obligations notified under Clause 13.4.1 shall only be possible **[30 (thirty)]** calendar days after the notification to the Step-in Party (hereafter the "**Step-in Period**") and in each case only where this Agreement provides for such possibility;
  - 13.4.3. The Step-in Party (or a third party assigned by the Step-in Party) shall be authorized to, in its sole discretion and without any obligations in this respect, and in accordance with the provisions of this clause, remedy the breach or acquire the entire contractual position (both active and passive) of the Company and become a party to this Agreement, by means of a unilateral statement which shall be addressed to Company and the Subscriber and sent before the ending of the Step-in Period;
  - 13.4.4. The Step-in Party shall also benefit from all the rights available or attributed to the

Company under this Agreement;

- 13.5. Clause 13.4 is a provision for the benefit of a third party. As from acceptance by the Step-in Party of this provision, this provision will be deemed to create a direct contractual relationship between the Subscriber and the Step-in Party, that can be independently enforced by the Step-in Party and that will not be affected by any non-compliance by the Company with this Agreement or any bankruptcy, judicial reorganisation or any other insolvency proceedings in respect of the Company.
- 13.6. During the period from the Company's receipt of any valid notice of termination by the Subscriber under clause 13.3 until the termination of the Agreement pursuant to that notice:
  - 13.6.1. if the Subscriber wishes to appoint a replacement supplier, the Company shall offer reasonable assistance in transitioning to any such replacement supplier;
  - 13.6.2. the Subscriber shall, at the Company's sole and absolute discretion:
    - (a) deliver up the Equipment at such address to the Company, its representative(s) or such third party as the Company requires; or
    - (b) allow the Company or its representatives access to the Premises or any premises where the Equipment is located for the purpose of:
      - (i) removing the Equipment; or
      - (ii) arranging the sale and transition of the Equipment to any replacement supplier at the Premises; and
  - 13.6.3. the Subscriber shall promptly pay to the Company any undisputed invoices which are outstanding at the date on which termination takes effect.
- 13.7. During the period from the Subscriber's receipt of any valid notice of termination by the Company under clause 13.3 until the termination of the Agreement pursuant to that notice, the Subscriber shall, at the Company's sole and absolute discretion:
  - (a) deliver up the Equipment at such address to the Company, its representative(s) or such third party as the Company requires; or
  - (b) allow the Company or its representatives access to the Premises or any premises where the Equipment is located for the purpose of:
    - (i) removing the Equipment; or
    - (ii) arranging the sale and transition of the Equipment to any third party at the Premises; and
  - (c) the Subscriber shall promptly pay to the Company any undisputed invoices which are outstanding at the date on which termination takes effect.
- 13.8. On termination of this Agreement for any reason:
  - 13.8.1. all licences granted under this Agreement shall immediately terminate and the Subscriber shall immediately cease all use of the Services;
  - 13.8.2. the Company may destroy or otherwise dispose of any of the Subscriber Data in its possession;

13.8.3. the Subscriber may destroy or otherwise dispose of any of the Company Data in its possession;

13.8.4. the Minimum Savings Guarantee shall terminate and cease to apply; and

13.8.5. any rights, remedies, obligations or liabilities of the parties that have accrued up to the date of termination, including the right to claim damages in respect of any breach of the Agreement which existed at or before the date of termination shall not be affected or prejudiced.

*14. We will introduce an arbitration mechanics: Independent and appointed upfront (in the form of an external evaluator)*

*15. The presence of a technical supplier, M&V auditor, third party adviser in the contract*

*15.1.1.*

*Further clarification on the termination; A soft termination agreement for small projects. Have a clause in the contract that the client is responsible to cover the removal cost if he wants to end the contract before the agreed date (for others reasons then the ones already covered in the contract)*

- *At the end of the term the implementer will have the right to either:*
  - *Have the equipment removed at his cost at a cost to be agreed*
  - *Or will have the right to purchase the assets at a value to be determined by an independent valuation agent appointed by the implementer*
  - *Or will have the right to extend the term based on a new contract with a new refurbished equipment*

## **16. FORCE MAJEURE**

Neither party shall have any liability to the other party under this Agreement if it is prevented from or delayed in performing its obligations under this Agreement, or from carrying on its business, by acts, events, omissions or accidents beyond its reasonable control, including, without limitation, strikes, lock-outs or other industrial disputes, failure of a utility service or transport or telecommunications network, act of God, war, riot, civil commotion, malicious damage, compliance with any law or governmental order, rule, regulation or direction, accident, breakdown of plant or machinery, fire, flood, storm or default of suppliers or sub-contractors, provided that the Subscriber is notified of such an event and its expected duration.

## **17. VARIATION**

No variation of this Agreement shall be effective unless it is in writing and signed by the parties (or their authorised representatives).

## **18. WAIVER**

No failure or delay by a party to exercise any right or remedy provided under this Agreement or by law shall constitute a waiver of that or any other right or remedy, nor shall it prevent or restrict the further exercise of that or any other right or remedy. No single or partial exercise of such right or remedy shall prevent or restrict the further exercise of that or any other right or remedy.

## **19. RIGHTS AND REMEDIES**

Except as expressly provided in this Agreement, the rights and remedies provided under this Agreement are in addition to, and not exclusive of, any rights or remedies provided by law.

## **20. SEVERANCE**

20.1. If any provision or part-provision of this Agreement is or becomes invalid, illegal or unenforceable, it shall be deemed deleted, but that shall not affect the validity and enforceability of the rest of this Agreement.

20.2. If any provision or part-provision of this Agreement is deemed deleted under Clause 18.1 the parties shall negotiate in good faith to agree a replacement provision that, to the greatest extent possible, achieves the intended commercial result of the original provision.

## **21. ENTIRE AGREEMENT**

21.1. This Agreement constitutes the entire Agreement between the parties and supersedes and extinguishes all previous Agreements, promises, assurances, warranties, representations and understandings between them, whether written or oral, relating to its subject matter.

21.2. Each party acknowledges that in entering into this Agreement it does not rely on, and shall have no remedies in respect of, any statement, representation, assurance or warranty (whether made innocently or negligently) that is not set out in this Agreement.

## **22. ASSIGNMENT**

22.1. The Subscriber shall not, without the prior written consent of the Company, assign, transfer, charge, any of its rights or obligations under this Agreement.

22.2. The Company may at any time assign, transfer, charge, sub-contract or deal in any other manner with all or any of its rights or obligations under this Agreement.

## **23. NO PARTNERSHIP OR AGENCY**

Nothing in this Agreement is intended to or shall operate to create a partnership between the parties, or authorise either party to act as agent for the other, and neither party shall have the authority to act in the name or on behalf of or otherwise to bind the other in any way (including, but not limited to, the making of any representation or warranty, the assumption of any obligation or liability and the exercise of any right or power).

## **24. THIRD PARTY RIGHTS**

The Company may exercise its rights under Clause 20.2 (whether for securitisation or otherwise) or under Clause 13.4 in relation to a Step-in Party. If the Company makes use of this right, the Step-in Party shall benefit from the rights granted to it under this Agreement. Save as provided in Clause 13.4, 20.2 and Clause 22, this Agreement is not intended to confer any benefit on any person or party who is not a party to this Agreement, and no such third party shall have any right to enforce this Agreement pursuant to the Contracts (Rights of Third Parties) Act 1999.

## **25. NOTICES**

25.1. Any notice required to be given under this Agreement shall be in writing and shall be delivered by hand or sent by pre-paid first-class post or recorded delivery post to the other party at its address set out in this Agreement, or such other address as may have been notified by that party for such purposes, or sent by fax to the other party's fax number as set out in this Agreement.

25.2. A notice delivered by hand shall be deemed to have been received when delivered (or if delivery is not in business hours, at 9 am on the first business day following delivery). A correctly addressed notice sent by pre-paid first-class post or recorded delivery post shall be deemed to have been received at the time at which it would have been delivered in the normal course of post. A notice sent

by fax shall be deemed to have been received at the time of transmission (as shown by the timed printout obtained by the sender).

**26. GOVERNING LAW**

This Agreement and any dispute or claim arising out of or in connection with it or its subject matter or formation (including non-contractual disputes or claims) shall be governed by and construed in accordance with the law of England and Wales.

**27. JURISDICTION**

Each party irrevocably agrees that the courts of England and Wales shall have exclusive jurisdiction to settle any dispute or claim arising out of or in connection with this Agreement or its subject matter or formation (including non-contractual disputes or claims).

**28. FURTHER ASSURANCE**

At its own expense, each party shall, and shall use all reasonable endeavours to procure that any necessary third party shall, promptly execute and deliver such documents and perform such acts as may reasonably be required for the purpose of giving full effect to this Agreement.

**29. COUNTERPARTS**

- 29.1. This Agreement may be executed in any number of counterparts, each of which when executed and delivered shall constitute a duplicate original, but all the counterparts shall together constitute the one agreement.
- 29.2. Transmission of the executed signature page of a counterpart of this Agreement by e-mail (in PDF, JPEG or other agreed format) with a copy of the body of this Agreement (in PDF, JPEG or other agreed format) shall take effect as delivery of an executed counterpart of this Agreement. If either method of delivery is adopted, without prejudice to the validity of the Agreement thus made, each party shall provide the others with the original of such counterpart as soon as reasonably possible thereafter.
- 29.3. No counterpart shall be effective until each party has executed and delivered at least one counterpart.

This has been entered into on the date stated at the beginning of it.

Signed by [NAME OF DIRECTOR] for .....  
and on behalf of [NAME OF COMPANY] Director

Signed by [NAME OF DIRECTOR] for .....  
and on behalf of [NAME OF SUBSCRIBER] Director

**SCHEDULE 1  
SERVICES, EQUIPMENT, PREMISES, TERM**

**1. SERVICES**

[describe]

**2. EQUIPMENT**

[Define Equipment by list, reference to the [●] Plan and/or as such Equipment as is adequate to deliver a certain level of [●] efficiency/efficacy in [●] per Watt (lm/W) in the Premises or relevant part of the Premises]

*Output needs to be clarified based on a technological backup i.e. kw/lumen etc.*

*Technology risk: We will make an amendment in case a better technology would reach the market and propose a renegotiation and a refurbishment with the new-found technology (for practitioner to propose the new technology on a lengthened term)*

**3. PREMISES**

[Address or relevant portion of premises at such address]

**4. TERM**

[Three (3)][Five (5)] years from the Effective Date.

[Note: Certain accounting or statistical rules might only apply to, or require, a contract with a longer duration]

**SCHEDULE 2  
SERVICE FEES**

**1. SERVICE FEES**

The Service Fees shall be an amount equal to the Subscriber's Energy savings in each calendar month during the Term resulting from the Subscriber's use of the Services ("Energy Savings"), as calculated in accordance with the performance and measurement protocol in the [●] Plan by:

- (a) for each calendar [month] in the first Contract Year, subtracting the Actual Monthly Energy Cost from the Baseline Monthly Energy Cost, for the relevant calendar month; and
- (b) for each calendar [month] in each successive Contract Year after the first Contract Year, subtracting the Actual Monthly Energy Cost from the Adjusted Baseline Monthly Energy Cost.

For the purposes of this Schedule 2 and the performance and measurement sections of the [●] Plan, the following capitalised terms have the following meaning:

**Actual Monthly Energy Used** the amount of Energy used to provide the [●] for the [●] Plan during the calendar month in question, plus the pro-rated Grid Fee;

**Actual Monthly Energy Cost** means the cost that was incurred by the Subscriber for the Actual Monthly Energy Used at the Actual Monthly Energy Price plus any Pro-rated Grid Fee;

**Actual Monthly Energy Price** means the price charged by the Energy Provider to the Subscriber for the Actual Monthly Energy Used;

**Adjusted Baseline Monthly Energy Cost** means the cost of the Baseline Monthly Energy Used expressed in the Actual Monthly Energy Price;

**Baseline Energy Month** means, in respect of a calendar month in any Contract Year, the corresponding calendar month during [the Baseline Energy Year][each of the [three] ([3]) preceding the Baseline Energy Years];

**Baseline Energy Year(s)** means latest 12 month period preceding the Effective Date for which Energy consumption and billing records are available.

**Baseline Monthly Energy Cost** means the cost of the Baseline Monthly Energy Used expressed in the Baseline Monthly Energy Price, plus any pro-rated Grid Fee at the rate prevailing in the Baseline Energy Month;

**Baseline Monthly Energy Price** means the price(s) used to calculate the Monthly Energy Baseline Cost;

**Baseline Monthly Energy Used**

means the amount of Energy used to provide the [●] for the [●] Plan during the Energy Baseline Month;

**Grid Fee**

any fee or charge paid to the Energy Provider in relation to the general expense of connecting to and running the relevant national, regional and/or local Energy grid or network (e.g. transmission charges such as the ("Transmission Network Use of System" (TNUoS) in the UK);

**Pro-rated Grid Fee**

the proportion of Grid Fee that can be attributed to the Energy used to provide [●] for the [●] Plan during the period covered by the Grid Fee, calculated by using the same proportion as the amount of Energy used to provide the [●] for the [●] Plan bears to the amount of Energy used for the whole Premises in which the [●] Plan is located.

For the avoidance of doubt, the amount of Energy used shall be established through measurement of Energy in watts for each [●] fitting type; and the measured wattage of each [●] fitting type multiplied by quantity of that type; multiplied by the operational hours.

**2. Minimum Savings Guarantee**

For the purposes of this Schedule 2, the following capitalised terms have the following meaning:

**Minimum Energy Savings**

[specify a minimum reduction in volume of energy consumption (energy consumption savings) in units of energy (e.g. kWh); or in monetary terms (e.g. a reduction in energy consumption in EUR at assumed price for the relevant type of energy or output (e.g. [Lumens per Watt (lm/W), (●)])

For the purpose of this Agreement (and in particular Clauses 2.6, 2.7 and this Schedule), the Minimum Energy Savings shall be recalculated to take account of any change in:

- The Premises;
- Energy Price;
- The proportion of the Premises occupied or vacated by the Subscriber, or covered by the [●] Plan;
- The [●] Plan; and/or
- Prepayment or late payment of any amount.

[All methods of measuring savings including engineered calculations, metering, equipment run times, pre- and post-installation measurements, etc. should be explicitly described for all equipment installed.]

### SCHEDULE 3 SUPPORT SERVICE LEVELS

#### 1. INTERPRETATION

This Schedule 3 shall set out the Support Services to be provided by Company under this Agreement.

The definitions used in the Agreement shall apply to any capitalised terms that are used but not defined in this Schedule. The following additional definitions and rules of interpretation shall apply in this Schedule.

##### 1.1 Definitions:

**Commercially Reasonable Efforts:** the same degree of priority and diligence with which Company meets the support needs of its other similar customers.

**Contact List:** a current list of Company contacts and telephone numbers to enable Subscriber to escalate its Support Requests, including:

- the first person to contact; and
- the persons in successively more qualified or experienced positions to provide the support sought.

**Subscriber Cause:** any of the following causes:

- any improper use, misuse or unauthorised alteration of the Services by Subscriber;
- any use of the Services by in a manner inconsistent with the terms of this Agreement;
- the use by Subscriber of any hardware or software not provided by Company or approved by Company for use by Subscriber in connection with the Services.

**Fault:** any failure of the Services or Equipment referred to in the Service Level Table.

**Service Desk Support:** any support provided by help desk technicians or an automated support and response service.

**Out-of-scope Services:** either of the following services:

- any services provided by Company in connection with any apparent problem regarding the Services or Equipment reasonably determined by Company not to have been caused by a Fault, but rather by a Subscriber Cause or a cause outside Company's control (including any investigational work resulting in such a determination).

**Service Levels:** the service level responses and response times referred to in the Service Level Table.

**Service Level Table:** the table set out in paragraph 5.

**Solution:** either of the following outcomes:

- correction of a Fault; or
- a workaround in relation to a Fault (including a reversal of any changes to the Services if deemed appropriate by Company) that is reasonably acceptable to Subscriber.

**Support Hours:** the service desk will be operational [9am – 5pm] UK Monday to Friday excluding public holidays.

**Support Request:** request made by Subscriber in accordance with this Schedule for support in relation to the Services, including correction of a Fault.

#### 2. SUPPORT SERVICES

2.1 During the Term, Company shall perform the Support Services during the Support Hours, in accordance with the Service Levels.

2.2 As part of the Support Services, Company shall:

- use Commercially Reasonable Efforts to correct all Faults notified under paragraph 4; and
- provide technical support for the Services in accordance with the Service Levels.

2.3 Company may reasonably determine that any services are Out-of-scope Services. If Company makes any such determination, it shall promptly notify Subscriber of that determination.

2.4 Subscriber acknowledges that Company is not obliged to provide Out-of-scope Services.

### 3. FEES

3.1 The provision of Support Services during the Term shall be included in the Service Fees.

### 4. SUBMITTING SUPPORT REQUESTS AND ACCESS

4.1 The Subscriber may request Support Services by way of a Support Request.

4.2 Each Support Request shall include a description of the problem and the start time of the incident.

4.3 The Subscriber shall provide Company with:

- prompt notice of any Faults; and
- such output and other data, documents, information, assistance and (subject to compliance with all Subscriber's security requirements notified to Company in writing) access to the Equipment and the Premises and personnel as are reasonably necessary to assist Company to respond to the relevant Support Request.

4.4 The Subscriber shall provide such access promptly, provided that Company complies with all the Subscriber's security requirements and other policies and procedures relating to contractors entering and working on the Premises notified to Company.

### 5. SERVICE LEVELS

5.1 Company shall:

- prioritise all Support Requests based on its reasonable assessment of the severity level of the problem reported; and
- respond to all Support Requests in accordance with the responses and response times specified in the table set out below:

Severity level of Fault	Definition	Service Level response and response time	Credit if Missed
1	<b>Business Critical Failures:</b> An error in, or failure of, the Services or Equipment that:	<b>Level 1 Response:</b> Acknowledgment of receipt of a Support Request within 120 minutes.  <b>Level 2 Response:</b> Company shall:	[1]% of the monthly Services Fee for each extra hour subject to a maximum of [100]% of the relevant monthly Service Fee

	<p>a) materially impacts the operations of the Subscriber's business;<sup>2</sup></p> <p>b) prevents necessary work from being done; or</p> <p>c) disables major functions of the Services from being used.</p>	<p>a) restore the Services to a state that allows the Subscriber to continue to use substantially all of the Services within 24 hours after the Level 1 Response time has elapsed; and</p> <p>b) exercise Commercially Reasonable Efforts until full restoration of usage of the Services is provided.</p> <p><b>Level 3 Response:</b></p> <p>Company shall work on the problem continuously and implement a Solution within <b>5</b> business days of receipt of the Support Request.</p> <p>If Company delivers a Solution by way of a workaround reasonably acceptable to the Subscriber, the severity level assessment shall reduce to a severity level 2 or lower.</p>	
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<sup>2</sup> Should insert specific ●/● levels

2	<p><b>System Defect with Workaround:</b></p> <p>a) a critical error in the Services or Equipment for which a work-around exists; or</p> <p>b) a non-critical error in the Services or Equipment that affects the operations of the Subscriber's business.</p>	<p><b>Level 1 Response:</b></p> <p>Acknowledgment of receipt of a Support Request within 24 hours.</p> <p><b>Level 2 Response:</b></p> <p>Company shall, within [5] Business Days after the Level 1 Response time has elapsed, provide:</p> <p>a) an emergency fix or workaround; and/or</p> <p>b) a temporary fix or workaround, which allows the Subscriber to continue to use substantially all of the Services in all material respects.</p> <p><b>Level 3 Response:</b></p> <p>Company shall provide a permanent Fault correction as soon as practicable and no later than [20] Business Days after Company's receipt of the Support Request.</p>	<p>[0.5]% of the relevant monthly Service Fee for each extra hour subject to a maximum of [30]% of the relevant monthly Services Fee</p>
3	<p><b>Minor Error:</b></p> <p>An isolated or minor error in the Services or Equipment that:</p> <p>a) does not significantly affect the use of the Services; or</p> <p>b) does not materially impact the Subscriber's business.</p>	<p><b>Level 1 Response:</b></p> <p>Acknowledgment of receipt of the Support Request within 48 hours.</p> <p><b>Level 2 Response:</b></p> <p>Company shall provide a permanent Fault correction within 90 Business Days after the Level 1 Response time has elapsed.</p>	<p>[0.3]% of the relevant monthly Service Fee for each extra hour subject to a maximum of [20]% of the relevant monthly Service Fee per incident</p>

5.2 The parties may, on a case-by-case basis, agree in writing to a reasonable extension of the Service Level response times.

5.3 Company shall give the Subscriber regular updates of the nature and status of its efforts to correct any Fault.

**6. OTHER REMEDIES**

If a Solution is not provided within the relevant Service Level response time, the Subscriber may escalate the Support Request to the parties' respective relationship managers as identified in the Agreement.

**SCHEDULE 4  
MANDATORY POLICIES**

***[LIST AND/OR ATTACH THE MANDATORY POLICIES HERE]***

The Mandatory Policies are:

- [Security Policy]
- [Occupational Health and Safety Policy]
- [Data and Privacy Policy]
- [Business Continuity and Disaster Recovery]

SCHEDULE 5

PLAN

[To be inserted, or a reference to location where kept]